

AUG 24 2006

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOSE BERBER,

Petitioner - Appellant,

v.

GEORGE ORTIZ,

Respondent - Appellee.

No. 05-15806

D.C. No. CV-01-01215-LKK

MEMORANDUM*

Appeal from the United States District Court
for the Eastern District of California
Lawrence K. Karlton, Senior Judge, Presiding

Submitted August 21, 2006**

Before: GOODWIN, REINHARDT and BEA, Circuit Judges.

California state prisoner Jose Berber appeals pro se from the district court's judgment denying his 28 U.S.C. § 2254 petition challenging his conviction for

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

battery and assault by an inmate. We have jurisdiction pursuant to 28 U.S.C. § 2253, and we affirm.

Berber contends that prosecutorial misconduct violated his due process rights. We reject this contention because Berber has not shown any alleged misconduct that had a “substantial or injurious effect or influence in determining the jury’s verdict.” *See Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993).

Berber contends that the prosecutor’s failure to provide discovery in a timely manner and the exclusion of the statement of co-defendant Curtis violated his rights to due process, confrontation, and the effective assistance of counsel. This contention is not supported by the record. Moreover, we reject this contention because Berber has not shown that either the trial court’s evidentiary rulings or the district attorney’s delays in producing documents rendered his trial fundamentally unfair. *See Spivey v. Rocha*, 194 F.3d 971, 977-78 (9th Cir. 1999).

Accordingly, Berber has not shown that the state court’s decisions were contrary to or an unreasonable application of clearly established federal law, as determined by the United States Supreme Court. *See* 28 U.S.C. § 2254(d).

AFFIRMED.